IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

RONNIE HAGER,	)	
Administrator of the Estate of Nancy Hager,	)	
	)	**Civil Action No. 7:01CV00053**
Plaintiff,	)	
	)	
v.	)	**Memorandum Opinion**
	)	
FIRST VIRGINIA BANK–SOUTHWEST,	)	
	)	**By: Samuel G. Wilson**
Defendant.	)	**Chief United States District Judge**
	)	

Plaintiff Ronnie Hager is the widower of Nancy L. Hager ("Hager") and the administrator of her estate. Plaintiff brings this action against his wife's former employer, First Virginia Bank–Southwest ("First Virginia"). Plaintiff claims violations of the Americans with Disabilities Act, 42 U.S.C. § 12101 ("ADA"), intentional infliction of emotional distress and wrongful death arising from the bank's failure to accommodate Hager's disability.[1] The court has jurisdiction over plaintiff's ADA claim pursuant to 28 U.S.C. § 1331 and may exercise supplemental jurisdiction over plaintiff's state law claim pursuant to 28 U.S.C. § 1367. This matter is before the court on defendant's motion for summary judgment. For the reasons stated, the court grants summary judgment for the defendant.

I.

[1]Nancy Hager, the original plaintiff in this action, died on November 1, 2001. The court substituted Ronnie Hager as party plaintiff on November 29, 2001 and granted him leave to file an amended complaint, which he filed on December 28, 2001.

In December 1995, Hager went to work as a teller at the George Wythe Branch of First Virginia Bank–Southwest. In December 1998, Hager had surgery commonly known as a bladder tuck. Hager spent several weeks recovering at home, and returned to work at the bank on January 19, 1999. Hager's doctor provided a note stating that Hager could return to work "without limitations". (Jones aff. ex. A.) At some point before October 4, 1999, however, Hager informed First Virginia that, as a result of her surgery, she could not lift anything weighing over 20 lbs. and needed constant access to the bathroom because of her weak bladder.[2]

In mid-February, Hager was assigned to work the first drive-thru window at the bank. Hager had previously been working at the second drive-thru window. The first and second drive-thru windows are nearly identical and are situated directly next to each other. The only substantial difference between the two window locations is that the first window has a tray that slides out to customers' vehicles, while the second window has a vacuum tube device. After moving to the first drive-thru window, Hager asked to be moved back to the second window because pushing the sliding tray and lifting items out of it caused her to suffer pain and discomfort. The bank informed Hager that she would have to remain at the first drive-thru window.

Hager made a request for accommodation because of her bladder condition on June 11, 1999, and the bank accommodated this request. On that date, a bank supervisor told Hager that she had to work the drive-thru alone for one hour because of a shortage of available employees.

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[2] Both parties' briefs and supporting affidavits contain several conflicting assertions of when the bank became aware of Hager's lifting restrictions and bladder condition following her surgery. It cannot be disputed, however, that on October 4, 1999–the date relevant to the ADA claim–the bank had been informed of Hager's limitations.

Hager told the supervisor she could not work alone because she took frequent trips to the bathroom. First Virginia arranged for an assistant manager to be present for that hour to assist Hager. (Wolford aff. ¶ 9.)

In July 1999, Hager provided First Virginia with a doctor's note stating that she needed constant access to the bathroom as a result of her bladder surgery. An assistant vice president at First Virginia then met with Hager and told her that she should go to the bathroom whenever it was necessary. Plaintiff never alleges that First Virginia prohibited Hager from using the bathroom whenever she needed. (Jones aff. ¶ 5.)

Plaintiff alleges that on October 4, 1999, Hager told a bank supervisor there was blood in her stool and that she was afraid her surgery may "have fallen." Plaintiff claims the supervisor refused to allow Hager to leave work early and instructed her to go to a doctor on a Saturday or holiday.[3] Hager then called Dr. Hurlburt and Dr. Clary and explained what had happened. Both doctors then sent notes to First Virginia. Taken in the light most favorable to the plaintiff, both notes were received by First Virginia on October 4. In appears likely, however, that Dr. Clary's note was not received until several days later. Handwriting on Dr. Clary's copy of his note indicates that, although dated October 4, is was not actually faxed until October 7. (Bank Reply Br. attach.) In any event, neither note mentioned the need for Hager to leave work immediately to see a doctor. Dr. Hurlburt's note stated:

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[3] According to the plaintiff, Hager was thus prevented from seeing her doctor until November 11, 1999. The record suggests otherwise, however. Hager worked only a half-day on October 5–the day after she was allegedly denied the opportunity to see a doctor–and was off work again on October 11, a bank holiday. Hager was also absent from work on October 14 and 15, and submitted a doctor's note to explain her absence on those days. (Wolford aff. ¶ 11.)

> To whom it may concern:
>
> This patient is currently under my care. Her condition limits her ability to bend, twist and lift. She reports that pulling drawers and frequent moving aggravates her condition. She should therefore be moved to a different work station to avoid worsening of her condition.
>
> Sincerely,
>
> /s/
>
> Charles P. Hurlburt

Dr. Clary's note stated:

> To whom it may concern:
>
> Mrs. Hager underwent interior and posterior repair with reduction of enterocele on 12/2/98. As a result of this surgery she is restricted from doing lifting greater than twenty pounds and also requires access to a bathroom on a regular basis. By restricting her activities as described above, this would greatly eliminate the potential for recurrence of her previous condition.
>
> I hope you find this information useful.
>
> Sincerely,
>
> /s/
>
> Anthony R. Clary, M.D.

According to the plaintiff, First Virginia then moved Hager from the first to the second drive-thru window on the following day, October 5, to comply with her doctors' requests. First Virginia's evidence, however, suggests that the bank accommodated Hager even earlier. According to the affidavits of First Virginia's employees, Hager was moved to the second drive-thru window on September 30, and was already stationed there when she experienced her bowel problems on October 4. (Jones aff. ¶ 7.) In the light most favorable to plaintiff, the court assumes First Virginia accommodated Hager on October 5, the day following her request.

Hager continued to work at the bank without further incident until mid-November. On November 11, Hager visited Dr. Clary and he determined that her bladder problems had recurred. On November 16, Dr. Clary sent a note to First Virginia removing Hager from work. She did not return to work at First Virginia.

Hager underwent several additional medical procedures but continued to experience discomfort, pain and bladder problems. She died two years later on November 1, 2001.

II.

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Pro. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). A genuine issue of fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). On a motion for summary judgment, the court must view the facts, and the inferences to be drawn from those facts, in the light most favorable to the non-moving party. Ross v. Communications Satellite Corp., 759 F.2d 355, 364 (4th Cir. 1985). First Virginia moves for summary judgment on both the ADA claim and the state law intentional infliction of emotional distress and wrongful death claim. The court will address each of these claims in turn.

A.

Plaintiff claims that First Virginia refused to reasonably accommodate Hager's disability in violation of the ADA. This court's January 10, 2002 decision held that the only actionable

allegation under the ADA that was not barred by the applicable period of limitations was First Virginia's refusal to allow Hager to leave work to see a doctor on October 4, 1999.

The ADA requires that employers provide "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless [the employer] can demonstrate that the accommodation would impose an undue hardship." 42 U.S.C. § 12112(b)(5)(A). Failure to reasonably accommodate a disabled employee gives rise to liability under the ADA. Toyota Motor Mfg., Kentucky, Inc., v. Williams, 534 U.S. 184 (2002). In a failure to accommodate case, a plaintiff establishes a prima facie case by showing (1) that she was an individual who had a disability within the meaning of the statute; (2) that the employer had notice of her disability; (3) that with a reasonable accommodation she could perform the essential functions of the position; and (4) that the employer refused to make such an accommodation. Rhoads v. F.D.I.C., 257 F.3d 373, 387 n.11 (4th Cir. 2001). Of course, a reasonable accommodation does not need to be the accommodation that the employee requested or preferred, see, e.g., Baert v. Euclid Beverage Ltd., 149 F.3d 626, 633 (7th Cir. 1998), and the employer need only accommodate disabilities of which the employer is aware. 42 USC § 12112(b)(5)(A); 29 CFR § 1630.9 app.

The court assumes that Hager's condition after her surgery amounted to a disability under the ADA, but finds First Virginia's accommodations reasonable. Here, First Virginia was informed that because of her surgery, Hager should not lift over 20 lbs., should avoid bending, twisting and lifting, and would require frequent access to a bathroom. First Virginia accommodated these limitations by allowing Hager access to the bathroom whenever necessary and by moving Hager to the second drive-thru window, where Hager claimed she did less lifting.

Hager never told First Virginia that her condition was so serious that it may require her to leave work at any time to see a doctor. Nor did Hager's doctors convey that sense of urgency. Rather, when Hager called her doctors and explained her condition to them, they simply requested that First Virginia move Hager "to avoid worsening of her condition." They neither suggested nor implied that Hager should be excused from work immediately to see a doctor. The following day, First Virginia did as Hager's doctors requested, and moved Hager to another workstation.

First Virginia provided Hager with reasonable accommodations for her disability as required under the ADA. Accordingly, the evidence does not support plaintiff's ADA claim for failure to accommodate and summary judgment is appropriate.

B.

Plaintiff also brings a claim for intentional infliction of emotional distress and wrongful death arising out of First Virginia's treatment of Hager during her employment. The complaint alleges that First Virginia's conduct was "intentionally reckless" and "outrageous and intolerable." Claims of intentional infliction of emotional distress are not favored under Virginia law. Ruth v. Fletcher, 377 S.E.2d 412, 415 (Va. 1989). The elements of the claim are (1) the defendant's conduct was intentional or reckless; (2) the conduct was outrageous and intolerable in that it offends against the generally accepted standards of decency and morality; (3) there was a causal connection between the defendant's conduct and the emotional distress; and (4) the emotional distress was severe. Womack v. Eldridge, 210 S.E.2d 145, 148 (Va. 1974).

The conduct of First Virginia in this case does not satisfy the outrageous or intolerable element of the claim. The bank allowed Hager to have access to a bathroom whenever necessary and to have another employee present when she was assigned to work the drive-thru alone. On

October 4, when Hager told First Virginia about her bowel problems and had her doctors contact the bank, First Virginia responded by changing Hager's workstation, at the latest, on the next day. The bank's actions do not reflect any deliberate disregard for Hager's condition that could meet the outrageous or intolerable standard. At worst, First Virginia's actions were to refuse to move Hager from one workstation to another in February, 1999, and to refuse to allow Hager to leave work early to see a doctor after notes from two of Hager's doctors on that day made no mention of a need for Hager to see them. However else these alleged actions may be characterized, they do not rise to the level of "intolerable conduct" that "offends . . . standards of decency and morality." Womack, 210 S.E.2d at 148. Therefore, in the light most favorable to the plaintiff, there is insufficient evidence to support a claim for intentional infliction of emotional distress and wrongful death arising from First Virginia's conduct.[4]

III.

First Virginia provided Hager with reasonable accommodations for her disability as required under the ADA, and the bank's conduct does not meet the standard of outrageousness required for intentional infliction of emotional distress. Accordingly, the court will grant defendant's motion for summary judgment. An appropriate order will be entered this day.

ENTER: This October 18, 2002.

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CHIEF UNITED STATES DISTRICT JUDGE

[4] The court thus finds it unnecessary to address First Virginia's arguments regarding other procedural problems with this claim.

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RONNIE HAGER,	)	
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	)	**Civil Action No. 7:01CV00053**
Plaintiff,	)	
	)	
v.	)	**FINAL ORDER**
	)	
FIRST VIRGINIA BANK–SOUTHWEST,	)	
	)	**By: Samuel G. Wilson**
Defendant.	)	**Chief United States District Judge**
	)	

For the reasons stated in the court's memorandum opinion, it is **ORDERED** and **ADJUDGED** that First Virginia Bank–Southwest's motion for summary judgment is **GRANTED**. This action is stricken from the active docket of the court.

ENTER: This October 18, 2002.

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CHIEF UNITED STATES DISTRICT JUDGE